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Supreme Court, U.S.
FILED

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No. _____

IN THE
Supreme Court of the United States

ROBERT RELFORD, MORRIS & MORRIS, P.S.C.,
AND JAMES M. MORRIS, ESQ.,
Petitioners,

v.

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE COMMISSION,
Respondent.

On Petition For Writ Of Certiorari
To The Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

JAMES M. MORRIS
Counsel of Record
MORRIS & MORRIS, P.S.C.
217 North Upper Street
Lexington, KY 40507
(859) 281-6981
Counsel for Petitioners

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QUESTIONS PRESENTED

1. Whether a public employee who prevails in an action to reverse a suspension and termination resulting from an illegal effort to drug-test the employee is entitled to attorneys' fees and costs under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988.

2. Whether a Fourth Amendment violation qualifies as a Civil Rights Action for purposes of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988.

3. Whether the lower courts' denial of statutory attorneys' fees and costs, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is contrary to clear Congressional intent, as well as this Court's rulings in *Hague v. CIO*, *Maine v. Thiboutot*, and *Farrar v. Hobby*, providing for attorneys' fees and costs for a prevailing party in an action alleging violations of Constitutionally-protected rights under the Fourth Amendment.

PARTIES TO THE PROCEEDINGS

The parties below were petitioner Robert Relford (appellant below), petitioner Morris & Morris, P.S.C. (appellant below), petitioner James M. Morris, Esq. (appellant below), and respondent Lexington-Fayette Urban County Government Civil Service Commission (appellee below).

Morris & Morris, P.S.C. is a Professional Corporation incorporated under the laws of the Commonwealth of Kentucky. It has no parent corporation and no interest is held by any publicly traded company.

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PETITION FOR WRIT OF CERTIORARI

Robert Relford, Morris & Morris, P.S.C., and James M. Morris, Esq. respectfully petition for a writ of certiorari to review the judgment of the Kentucky Supreme Court in this case.

OPINIONS BELOW

The order of the Commonwealth of Kentucky Supreme Court is unpublished and is reprinted in the Appendix to this petition at App. 1a. The opinion of the Commonwealth of Kentucky Court of Appeals is unpublished and is reprinted at App. 4a-10a. The opinions of the Commonwealth of Kentucky Fayette County Circuit Court are unpublished and are reprinted at App. 11a-12a and 13a-20a, respectively.

STATEMENT OF JURISDICTION

The Commonwealth of Kentucky Supreme Court entered an order denying discretionary review on October 18, 2000. The Commonwealth of Kentucky Court of Appeals entered an Opinion on December 3, 1999, and denied Plaintiffs-Appellants' Petition for Rehearing on February 25, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment to the United States Constitution provides in pertinent part: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (Supplement 1977) provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

Section 10 of the Commonwealth of Kentucky Constitution provides in pertinent part: "The people shall be secure in their persons, houses, papers, and possessions, from unreasonable search and seizure."

STATEMENT OF THE CASE

This case arises under the Civil Rights Attorney's Fees Awards Act of 1976, codified in 42 U.S.C. § 1988. At issue is whether a public employee who prevails in an action to reverse a suspension and termination following an illegal effort to drug-test the employee is entitled to attorneys' fees and costs under the Act. The Petitioners include Robert Relford, who was illegally subjected to the drug-testing policy and who successfully overturned his improper suspension and termination, and his legal counsel throughout these proceedings, Morris & Morris, P.S.C., and James M. Morris, Esq.

Throughout all of the proceedings below, Petitioners have alleged that the Respondent's actions violate Relford's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. The Respondent is the Lexington-Fayette Urban County Government Civil Service Commission, charged with the responsibility of protecting public employees from the unconstitutional or improper actions of the government, as well as the entity ultimately responsible for suspending Relford, subjecting him to continued illegal drug testing, and terminating his position. Petitioners successfully overturned the Respondent's actions, but now seek the costs and attorneys' fees attendant to the protection of Petitioner's civil rights, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. § 1988.

A. Statement of Facts

Petitioner, Robert Relford, ["Relford"], as a Civil Service Employee of the Lexington-Fayette Urban County Government, ["LFUCG"], was subject to the LFUCG's "Alcohol and Drug Free Workplace Guidelines and Procedure Handbook." On June 20, 1997, Relford was served by the LFUCG with a "Notice of Reasonable Cause" ordering him "to be tested under reasonable cause testing" due to his "recent arrest for '**possession of a controlled substance** and drug paraphernalia.'" [Emphasis added.] Since Relford had not been arrested for "possession of a controlled substance," and since an arrest solely for "drug paraphernalia" did not comport with the Constitutionally-mandated drug-testing policies, Relford, through counsel, requested that a proper basis

for the "Notice of Reasonable Cause" comport with the mandates of the LFUCG's Handbook, and that the notice properly reflect the actual facts surrounding the demand for testing.

Despite the blatant error contained in the Notice, and despite Appellant's request for amendment of the Notice, the LFUCG refused to amend the Notice and continued to insist that Relford comply with the faulty and unconstitutional drug-testing Notice. Faced with the LFUCG's refusal to provide a proper Notice, and on advice of counsel, Relford refused to take the test, asserting his Fourth Amendment right to be free from unlawful searches and seizures, given the false pretenses upon which the "Reasonable Cause Testing" was based, and given the lack of Constitutional basis therefor.

On July 2, 1997, the LFUCG filed a Charge with the LFUCG Civil Service Commission seeking Relford's termination for his refusal to submit to the drug test. On July 3, 1997, the LFUCG suspended Relford without pay, pending the outcome of the Charge. On October 15, 1997, the LFUCG Civil Service Commission entered an Opinion/Order specifically holding that "the Government failed to adequately advise Mr. Relford of the grounds for which he was requested to take the drug test ... by and through the obviously inaccurate or defective 'Notification of Reasonable Cause Testing'; [and,] [t]hat the Government's guidelines in regard to 'reasonable cause testing' are confusing."

Inexplicably, despite the admissions by the Commission that the LFUCG's policy violated Relford's Constitutional rights, the Commission upheld the 30-day suspension and further ordered Relford to undergo

invasive drug counseling and random drug testing contrary to Relford's constitutional rights. Relford appealed the decision to the Fayette Circuit Court, pursuant to the Urban-County Governments Chapter, Kentucky Revised Statute ["KRS"] § 67A.

Following briefing of the issue, the Fayette Circuit Court specifically found that the Commission had acted arbitrarily and capriciously in suspending Relford; that the LFUCG failed to follow the guidelines set forth in the policy; and, as a consequence, the LFUCG's attempts to force Relford to submit to the invasive "reasonable cause testing" and continued testing were illegal. Accordingly, the Fayette Circuit Court held that Relford was unlawfully subject to the drug-testing procedures, and was further unlawfully required to undergo subsequent drug testing. Based upon these findings of fact, the Court reversed the Opinion/Order of the Commission in its entirety. App. 13a-20a.

Relford, as a prevailing party seeking redress for violations of his constitutional rights, then moved the court for an award of attorney's fees and costs incurred in prosecuting the successful appeal. The court specifically stated that "**I think that there should be some provision in the law that public employers should have to maybe pay reasonable attorney fees, for people who have appealed its decisions,**" inasmuch as it is more equitable for the government to pay for the mistakes that is has caused rather than to require the employee to bear the burden. [Emphasis added]. However, stating that it was unaware of any statutory authority allowing for the recovery of attorney's fees following a successful Civil

Service Commission appeal, the Circuit Court reluctantly denied Relford's request.

Relford subsequently requested that the Commonwealth of Kentucky Court of Appeals set aside the trial court's Order denying attorneys' fees, inasmuch as Relford is statutorily and constitutionally entitled to recover all costs and fees incurred. The Court of Appeals refused, holding that "Relford's Fourth Amendment claim [is not] within the compass [sic] of the Civil Rights Fee Act [sic]," even though Relford's successful reversal of the improper actions was based upon the unconstitutional drug-testing procedures utilized by the LFUCG. App. 4a-10a.

B. The Lower Court Decisions

(1) The Fayette County Circuit Court Ruling

On July 15, 1998, the Fayette Circuit Court entered an Opinion and Order Reversing the Civil Service Commission's suspension and mandatory drug testing of Petitioner. The circuit court found that it was not necessary to address the constitutional argument since the Respondent failed to follow its own drug testing policies by attempting to force Petitioner to undergo drug testing, by suspending Petitioner for his refusal, and by requiring Petitioner to engage in ongoing mandatory drug testing. Based upon the circuit court's Opinion and Order, Petitioner requested recovery of reasonable attorneys' fees and costs incurred in protecting Petitioner's civil rights. Although the presiding judge indicated his desire to award any such fees, the circuit court Overruled Petitioner's request stating that it was

unaware of any provisions authorizing such an award. App. 11a.

(2) The Commonwealth of Kentucky Court of Appeals Ruling

The Petitioners appealed the Fayette Circuit Court's denial of attorneys' fees to the Kentucky Court of Appeals. On December 3, 1999, the Kentucky Court of Appeals issued an opinion affirming the Circuit Court's ruling. App. 4a-10a. The Court of Appeals found that the Petitioners had failed to state a cognizable claim under the Civil Rights Attorney's Fees Awards Act upon which relief could be granted, despite the Petitioner's Fourth Amendment Claim.

Relying upon the Kentucky case of *Dawson v. Birenbaum*, Ky., 968 S.W.2d 663 (1998), the Court of Appeals ruled that a public employee's efforts to stop an illegal suspension, termination, and mandatory on-going drug-testing pursuant to the Fourth Amendment did not amount to an "asser[tion of] a 'civil rights' claim cognizable under Civil Rights Fee Act [sic]." App. 7a. Based upon this improper assumption, the Court of Appeals held that Relford was not a prevailing party entitled to attorneys' fees under the Civil Rights Attorney's Fees Awards Act. App. 7a.

(3) The Commonwealth of Kentucky Supreme Court Ruling

On October 18, 2000, the Kentucky Supreme Court denied Discretionary Review of the Opinion issued by the Kentucky Court of Appeals on December 3, 1999. App. 1a.

REASONS FOR GRANTING THE WRIT

This case turns on the availability of attorneys' fees and costs to a public employee who prevails in an action to reverse a suspension and termination that resulted from violations of the prevailing party's Fourth Amendment rights. The state courts held that, although the purpose behind Kentucky Revised Statute Chapter 344 was to "provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964," neither the state statute nor 42 U.S.C. § 1988 apply to a party who prevails in asserting a violation of Constitutionally-protected rights. This Court should review that holding for several reasons: it is inconsistent with numerous decisions of this Court; it reflects the splits of authority among the courts of appeals; and it addresses an issue of surpassing practical importance to this and thousands of other civil rights employment cases.

I. THE RULINGS BELOW CONFLICT WITH THIS COURT'S RULINGS IN *FARRAR V. HOBBY, MAINE V. THIBOUTOT, HAGUE V. CIO*, AND CLEAR CONGRESSIONAL INTENT.

The express purpose of the Kentucky Civil Rights Act, as set forth in Kentucky Revised Statute [hereinafter "KRS"] § 344.020 is to "provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964," a Federal statutory scheme designed as "a centerpiece of federal efforts to end discrimination in the workplace." 42 U.S.C. § 2000e-17.

Perhaps more importantly, however, in *Dawson v. Birenbaum*, Ky., 968 S.W.2d 663 (1998), Kentucky's Supreme Court expressly recognized that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (Supp. 1977) [hereinafter "the Attorney's Fees Act"] grants the courts of Kentucky the authority to award attorney's fees to a "prevailing party" who seeks to vindicate rights secured by, inter alia, 42 U.S.C. § 1983 (Civil Rights Act of 1871).

The Attorney's Fees Act provides, in pertinent part, that:

> In ***any action or proceeding to enforce a provision of*** sections 1981, 1982, *1983*, 1985 and 1986 of this title, title IX of Public Law 92-318 ..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1977 Supp.)(emphasis added). The United States Congress passed the Attorney's Fees Act in order to encourage aggrieved individuals to pursue the

protection afforded by the various Civil Rights Acts. As stated by this Honorable Court, in *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980), quoting Representative Drinan:

> [T]he purpose of the Civil Rights Attorney's Fees Awards Act [is] to authoriz[e] the award of a reasonable attorney's fee in actions brought in State or Federal courts. And Congress viewed the fees authorized by § 1988 as "an integral part of the remedies necessary to obtain" compliance with § 1983. It follows from this history and from the Supremacy Clause that the fee provision is part of the § 1983 remedy whether the action is brought in federal or state court.

Inasmuch as Kentucky has no counterpart to the Civil Rights Act of 1871, an Act designed as an "extension to include [protection for] rights, privileges and immunities secured by the laws of the United States **as well as the Constitution**," [emphasis added], *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980), citing *Hague v. CIO*, 307 U.S. 496, 525-26 (1939), a party seeking to vindicate the civil rights secured thereunder, including specifically the Fourth Amendment protections, is left with the option of either joining that § 1983 claim with a state claim in a state court action, or pursuing the § 1983 claim in federal court, jurisdictional requirements permitting, with the state claims joined pursuant to pendant jurisdiction.

Most recently, in *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court discussed the prevailing party, stating that a plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111.

In the case at bar, the LFUCG's actions were reversed by the reviewing court, based upon a Complaint filed by Petitioner alleging constitutional violations. Pursuant to the holding in *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944) "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable." As such, it is of no consequence that the reviewing court specifically avoided a final decision on the merits of Petitioner's constitutional claims. In fact, the reviewing court's refusal was completely proper under the holding of *Spector Motor*.

Since the decision reached hereinbelow was due to the filing of the suit by Petitioner seeking relief for the violations of his Civil Rights, the lower courts' decisions denying Petitioner's right to recover fees, based upon a mistaken belief that Petitioner's Fourth Amendment claim is not cognizable under the Civil Rights Attorney's Fees Awards Act, are entirely without basis, and must be clarified by this Court.

II. THE U.S. CIRCUIT COURTS ARE DIVIDED AS TO THE PROPER STANDARD FOR AWARDING ATTORNEY'S FEES TO A PREVAILING PARTY IN A CONSTITUTIONAL RIGHTS VIOLATION CASE..

Although the issue of recovery of attorneys' fees in civil rights matters has been presented to this Court on numerous occasions, there has been no definitive determination as to the proper standard to be utilized to determine whether a public employee individual is a

"prevailing party" for purposes of deciding if a party is entitled to reimbursement for attorneys' fees and costs incurred. The Attorney's Fees Act, as set forth in detail hereinabove, provides for an award of reasonable attorney's fees to prevailing parties, other than the United States, as part of the costs of the action. 42 U.S.C. § 1988 (1977 Supp.). "Prevailing party," like other provisions of the surrounding statutes, has been liberally construed to effect broad Congressional goals. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)(a litigant is a prevailing party if he "succeed[s] on any significant issue in litigation which achieves some of the benefit the [party] sought in bringing suit").

In *Antonsen v. Ward*, 943 F.2d 198 (2d Cir. 1991), the Second Circuit, citing various cases decided on pendent state-law claims, stated that even where the only relief awarded is on state grounds, the fees could be awarded if the petitioner sought relief on both state and federal grounds. More recently, in *Kilgour v. Pasadena, City of*, 53 F.3d 1007 (9th Cir. 1995), the Ninth Circuit Court of Appeals discussed the divergence of the various circuits. In ultimately adopting the "catalyst" standard utilized by the majority of circuits, the court stated that "[w]e follow and adopt the authority indicating that *Farrar* does not preclude a catalyst test. A catalyst test is an alternate theory for determining the prevailing party if no relief on the merits [of the constitutional claims] is obtained." *See also, Beach v. Smith*, 743 F.2d 1303, 1306 (9th Cir. 1984)("even in the absence of a favorable judgment, a litigant may be a prevailing party for purposes of an attorney fee award if his action was a 'catalyst' which motivated the defendant to provide the relief originally sought through litigation"); *Exeter-West Greenwich*

Regional Sch. v. Pontarelli, 788 F.2d 47, 50 (1st Cir. 1986)("cases have set out two standard tests for determining when a party shall be deemed 'prevailing' under Section 1988.... The first we now call the 'merits' test. The second is already known as the 'catalyst' test.")

The Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have likewise indicated an approval of the "catalyst" standard, thereby allowing a party to be considered to be a prevailing party if the filing of the action has created the relief sought. *See, e.g., Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 550 (3rd Cir. 1994); *Craig v. Gregg County, Texas*, 988 F.2d 18 , 20-21 (5th Cir. 1993); *Seals v. Quarterly County Court of Madison County, Tennessee*, 562 F.2d 390 (6th Cir. 1977); *Zinn by Blankenship v. Shalala*, 35 F.3d 273 , 276 (7th Cir. 1994); *Little Rock School Dist. v. Special School Dist. 1*, 17 F.3d 260 , 263 n.2 (8th Cir. 1994); and *American Council of the Blind v. Romer*, 992 F.2d 249 , 251 (10th Cir.), *cert. denied*, 114 S.Ct. 184 (1993). However, in *S-1and S-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49, 51 (4th Cir. 1994)(*en banc*), the Fourth Circuit took a differing approach, denying the applicability of the "catalyst" approach given the *Farrar* decision reached by this Court.

In the Sixth Circuit case cited above, *Seals v. Quarterly County Court of Madison County, Tennessee*, 562 F.2d 390 (6th Cir. 1977), the court has further acknowledged that the purpose of the Attorney's Fees Act expressly includes the discretion to award attorney's fees even when the case is resolved on the basis of a state law claim arising out of a common nucleus of operative facts, if the action involves a substantial constitutional claim and a pendant state law claim. The *Seals* rationale is obvious: Given the prevailing rule that courts will avoid the question of

constitutionality unless necessary to a proper determination of merits of the cause under consideration, *Spector Motor Co. v. McLaughlin*, 323 U.S. 101, 105 (1944), plaintiffs who effectively argue the merits of a constitutional violation, but who are faced with a determination based solely upon a pendant state claim, face the very financial hardships Congress sought to eliminate through the introduction of the Attorney's Fees Act. *Maine v. Thiboutot*, 448 U.S. 1, 11, n. 12 (1980).

As clearly adopted by the Sixth Circuit, in *Seals, supra, citing* H.R.Rep.No. 94-1558, 94th Cong., 2d sess. 4 n.7 (1976):

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine, supra; United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.3d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers v. Gibbs, supra*, at 725, 86 S.Ct. 1130.

Seals, 562 F.2d at 393-394. After analyzing the Congressional intent behind the Attorney's Fees Act, the *Seals* court further held:

> [T]he language quoted above appears to us to be a clear-cut indication that Congress considered the [ultimate determination being based upon a non-constitutional claim] and provided an express indication as to how the general language of the 1976 statute was intended to be applied.

Id. at 394. *See also Fluhr v. Roberts*, 463 F.Supp 745, 747 (W.D.Ky. 1979)(holding that the goal of the Attorney's Fees Act is to "encourage the vindication of civil rights," and to encourage private enforcement of civil rights acts by awarding reasonable fees to prevailing parties).

This "common nucleus" test set forth in *Maher v. Gagne*, 448 U.S. 122, 132 (1980), and the "catalyst" test set forth hereinabove, are equally appropriate to a determination of whether a public employee, seeking retribution for a blatant violation of his constitutional rights through the appropriate channels, is entitled to recovery of the attorneys' fees and costs expended to protect those well-defined rights. In *Maher*, this Honorable Court held that, in order for an award to be proper on a non-fee claim under the Attorney's Fees Act, the non-fee claim and the unresolved constitutional claim need only arise out of a common nucleus of operative fact, and the unresolved constitutional claim must have been substantial. Likewise, in *Intern. Ass'n of Machinist v. Affleck*, 504 A.2d 468 (R.I. 1986), *citing Maher, supra*, and *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974), the court held:

> The standard, as employed by courts in determining the appropriateness of an award of attorneys' fees, merely requires that plaintiffs'

> asserted constitutional claim not be "wholly insubstantial," "obviously frivolous," "absolutely devoid of merit," or obviously without merit or unsound in view of previous court decisions that have foreclosed the subject sought to be addressed. The substantiality test does not require a finding that plaintiffs would ultimately prevail on the merits of their ... claim.

Intern. Ass'n of Machinists v. Affleck, 504 A.2d at 471.

In *Goosby v. Osser*, 409 U.S. 512, 518 (1973), this Court mandated that "a claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Utilizing this approach, disallowing recovery of fees under the Attorney's Fees Act, for pendant state claims joined with qualifying federal claims, "would both contravene the congressional goal of encouraging vindication of constitutional rights and undermine the judicial policy of avoiding unnecessary decision on important constitutional issues." *Dawson v. Birenbaum*, Ky., 968 S.W. 663, 667 (1998), *citing Affleck, supra.*

As recognized by this Court in *Maine, supra*, the question of whether a particular action is covered by the Attorney's Fees Act is controlled by the plain language of the statute. *Maine*, 448 U.S. at 11. As the Third Circuit, in *Sullivan v. Com. of Pa. Dept. of Labor, etc.*, 663 F.2d 443, 447 (3rd Cir. 1981), explained:

> In particular, the courts have stressed that an award of attorneys' fees under section 706(k) and

its companion provision, 42 U.S.C. § 1988, is not limited to the situation in which the plaintiff prevails by a judgment in the Title VII action itself, by a favorable resolution of state **administrative proceedings**, or by a judgment in **any other civil rights action**. Rather, they have held that attorneys' fees are available **whenever** a civil rights cause of action ultimately results in the plaintiff's having obtained relief. [Footnote omitted; emphasis added].

After discussing whether the actions brought by the plaintiff in *Sullivan* could be fairly characterized as a "catalyst" for vindication of her rights, the court went on to hold:

> [D]ecisions of this court ... have never held that a plaintiff, in order to be entitled to attorneys' fees, had to be the prevailing judgment-winner in the district court itself. Rather, we have articulated a causal-connection standard whose central inquiry has been variously stated as whether the plaintiff obtained the relief sought "as a result of" the civil rights **judicial efforts**, or whether these efforts were a "material factor" in obtaining the relief. Accordingly, ***we would be departing from the spirit of principles which we have previously announced if we were to hold that attorneys' fees may not be awarded when a ... plaintiff obtains the relief sought through arbitration, rather than through settlement, administrative action, or other change in the defendants' conduct, even though there exists a causal link between the ... litigation and the relief obtained.*** Our decisions

> have given expression and effect to the congressional intent that "for purposes of the award of counsel fees [under section 1988], parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."

Sullivan, 663 F.2d at 449, *citing* S.Rep.No. 94-1011, 94th Cong., 2d Sess. 5. [Emphasis added].

Public employees, like those employees affected in each of the above-instances, are forced to engage in protracted litigation in order to defend their constitutionally protected civil rights. Accordingly, like the prevailing parties in each of the above cases, they should be entitled to recover their attorney's fees and costs incurred as a result of the government's inappropriate and unconstitutional actions -- even when their efforts are resolved in their favor on pendant state law grounds.

In the immediate case, the question of whether Relford may be fairly characterized as a "prevailing party" cannot be seriously disputed. Pursuant to the terms of the Opinion and Order of the Fayette Circuit Court, and the Opinion Affirming by the Kentucky Court of Appeals, the Commission's suspension of Relford was arbitrary and capricious and was reversed in its entirety. Since Relford was successful in obtaining precisely the relief he sought through the complaint based upon violations of his constitutional rights, Relford clearly qualifies as a "prevailing party" within the terms of the Attorney's Fees Act.

In light of the plain language of the Attorney's Fees Act as acknowledged by this Honorable Court, the clear and unequivocal Congressional intent displayed in the Act, and the broad scope of coverage which has been afforded the Attorney's Fees Act, there can be no other conclusion but that Relford's claims involved blatant violations of his Constitutional rights. In situations involving a constitutional challenge, disallowing recovery of attorney's fees because the determination was made upon pendant state claims would improperly penalize the plaintiff "because the circuit court did not find it necessary to resolve his federal constitutional claims." *Dawson*, 968 S.W.2d at 667.

III. THE KENTUCKY COURTS ARE MISAPPLYING CONSTITUTIONAL LAW, THEREBY DENYING INDIVIDUAL CONSTITUTIONAL RIGHTS AFFORDED THEREUNDER.

In Affirming the trial court's Opinion and Order, the Kentucky Court of Appeals concluded that Petitioner's Fourth Amendment claim was not "within the compass [sic] of the Civil Rights Fee Act [sic]," as he did not assert a "civil rights" claim cognizable under 42 U.S.C. § 1988. App. at 7a.

Contrary to the conclusion reached by the Kentucky Courts, claims alleging a violation of the Fourth Amendment clearly fall within the ambit of protections afforded by the Civil Rights Fee Act. In *Garrett v. Clarke*, 147 F.3d 745 (8th Cir. 1998), a prisoner argued that his residence had been illegally searched in violation of his Fourth Amendment rights. In order to protect his constitutional rights, the prisoner brought an action

alleging violations of 42 U.S.C. § 1983 against the police officers who conducted the search and the department where the officers were employed. *Id.* at 746. Although the suit was dismissed against the police department on other grounds, the court held that the remainder of the prisoner's § 1983 claims were proper. *Id.* at 747. *See also Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986)(violation of Fourth Amendment rights during a search for records); *Gordon v. Degelmann,* 29 F.3d 295 (7th Cir. 1994)(violation of Fourth Amendment rights during arrest); *Coppinger v. Metro-North Commuter R.R.,* 861 F.2d 33 (2nd Cir. 1988)(violation of Fourth Amendment rights occurred during drug testing).

More importantly, it has recently been established that attorneys' fees can be recovered for alleged violations of § 1983, regardless of how the claim arose or was pled. In *Goss v. City of Little Rock, Ark.,* 151 F.3d 861 (8th Cir. 1998), *cert. denied,* 119 S.Ct. 1355 (1998), a landowner brought an action against the city alleging that a proposed dedication in return for the opportunity to rezone amounted to an unconstitutional taking. Although the trial court stated that the city may decline to rezone the property on other grounds, the court noted that the landowner had not been awarded a "purely Pyrrhic victory," since he was "eligible for damages and attorney fees." *Id.* at 864. In reaching its conclusion that the landowner was entitled to an award of attorneys' fees, the *Goss* court made several observations regarding the applicability to the Attorney's Fees Act to § 1983 claims.

First, the *Goss* court found that the landowner had sufficiently established the elements of a § 1983 action

involving the taking of his property without just compensation, ***even though he never pled the elements of*** § 1983. *Id.* at 864. In so doing, the *Goss* court completely dismissed the notion that the landowner's failure to ***name the statute*** had any relevance since the landowner had "cited the ***Constitution itself*** as the basis of his lawsuit." *Id.* at 865. After noting that this was a question of first impression, the *Goss* court opined:

> We conclude that Goss's suit is a "proceeding to enforce" § 1983 within the meaning of § 1988(b). We start with the statute's language. As the Supreme Court has observed, the meaning of "a proceeding to enforce" § 1983 is unclear on its face because § 1983 does not create substantive rights that a person can "enforce" in the typical sense of the word. *See Maher v. Gagne*, 448 U.S. 122, 129 n.11, 100 S.Ct. 2570, 65 L.E.2d 653 (1980). Instead § 1983 establishes a means by which people can enforce the Constitution. ***It simply provides that, when a state actor violates a person's constitutional rights, that person can sue the state actor***. That, of course, is exactly what Goss did. Indeed, § 1983 does nothing more than make lawsuits like this one possible. ***Thus Goss did enforce § 1983 in that he did precisely what it authorizes people to do.***

Id. [Emphasis added.] The *Goss* court then proceeded to analyze whether § 1988(b) allowed the landowner to recover attorneys' fees in the situation presented. Finding in the affirmative, the court held:

> The function of an award of attorney's fees [under § 1988(b)] is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.[] Goss brought a "meritorious civil rights claim," although he did not cite § 1983. Furthermore, "the legislative history makes it perfectly clear that [] *§ 1988(b)] was intended to apply in any action for which § 1983 provides a remedy."* [] *This is such a case. Goss [claimed] that Little Rock, a state actor, violated his constitutional right not to have his property taken without just compensation. Section 1983 therefore afforded him a remedy. Thus holding that Goss's action falls within the scope of § 1988(b) will further the policy underlying the statute's enactment.*
>
> * * *
>
> [T]he fact that a party prevails on a ground *other than § 1983 does not preclude an award of attorney's fees under § 1988.* If § 1983 would have been an appropriate basis for relief, *then [the plaintiff] is entitled to attorney's fees under § 1988* even though relief was actually awarded on another ground.[]

Id. at 866, *citing Maher v. Gagne*, 448 U.S. at 132 n. 15. [Citations omitted; emphasis added.]

In the case at bar, Petitioner properly alleged, before the Civil Service Commission, that the LFUCG violated

his Fourth Amendment rights against unreasonable search and seizure by performing an unlawful drug test and subsequent on-going drug-testing. As a violation of Petitioner's Fourth Amendment rights is squarely protected by the remedies afforded under § 1983, this claim for fees is precisely the type of claim cognizable under § 1988. *See, e.g., Garrett, supra.* Accordingly, as Petitioner was required by statute to appear before the Civil Service Commission to seek redress from the LFUCG's violation of his Fourth Amendment rights, and since the within action "arose from a common nucleus of operative fact," *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1996), Petitioner is clearly "proceeding to enforce a provision of ... 1983," within the legislative meaning of § 1988(b). *Goss, supra.* To be certain, "[Petitioner] did enforce § 1983 in that he did precisely what it authorizes people to do." *Goss*, 151 F.3d at 865.

In fact, in reviewing this matter, the trial court directly addressed Petitioner's Fourth Amendment Constitutional claims in the Opinion and Order, stating:

> Reasonable suspicion testing has been held constitutional under the Fourth Amendment of the Constitution of the United States. [Citations omitted]. What is "reasonable" has been based on the circumstances surrounding the suspicion in the particular case.
>
> * * *
>
> [However,] ***whether or not the constitutional concerns are satisfied in this case is not really relevant because the respondent has failed to follow its own drug testing policies.***

App. at 15a-16a. [Emphasis added.]

As in *Goss, supra,* it is irrelevant whether the violation of Petitioner's Fourth Amendment rights was specifically pled pursuant to § 1983, nor that the issue was resolved on pendant state law claims. Based on *Goss*, 151 F.3d at 865, all that Petitioner was required to do was establish:

> [T]hat [the LFUCG], a state actor, violated his constitutional right [to be free from unreasonable searches and seizures]. Section 1983 therefore afforded him a remedy. Thus holding that [Petitioner]'s action falls within the scope of § 1988(b) will further the policy underlying the statute's enactment.

Although the Civil Service Commission did not find a violation of Petitioner's Fourth Amendment rights, the Commission, as well as all of the Kentucky courts that have addressed the issue, specifically found that the LFUCG failed to follow its own policies and procedures by requiring Petitioner to undergo an illegal drug test and mandatory drug-testing. Each court resolved Petitioner's pendant state claims in his favor rather than address the Constitutional violations alleged.

In each and every forum to which he was *statutorily obligated* to resort, Petitioner affirmatively sought to rectify a violation of his Fourth Amendment rights by a state actor. This is all that is required under § 1983, regardless of whether the litigation is ultimately resolved on other pendant claims. Consequently, as in *Goss, supra,* Petitioner should be afforded the remedy to which he would otherwise be entitled under § 1988(b) if he had

been free to seek enforcement of his constitutional rights in any forum other than the Civil Service Commission.

To hold otherwise results in a gross miscarriage of justice, creating an anomaly whereby an employee properly pursuing a legislatively mandated process is prohibited from recovering relief clearly provided by the language and spirit of §§ 1983 and 1988. The Kentucky courts' failure to permit that relief, on the grounds that Petitioner's Fourth Amendment Constitutional claims do not fall within the Attorney's Fees Act, is clearly erroneous and requires clarification by this Honorable Court to assure that further miscarriages of justice do not occur in the future.

CONCLUSION

Based on the foregoing, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES M. MORRIS
Counsel of Record
MORRIS & MORRIS, P.S.C.
217 North Upper St.
P.O. Box 394
Lexington, KY 40588-0394
(859) 281-6981
Counsel for Petitioners

Dated: March 13, 2001

APPENDICES

SUPREME COURT OF KENTUCKY
2000-SC-0263-D
(1998-CA-2039 & 1998-CA-2301)

ROBERT RELFORD,
MORRIS & MORRIS, P.S.C.,
and JAMES M. MORRIS — MOVANTS

V.

FAYETTE CIRCUIT COURT
NO. 1997-CI-3837

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT
CIVIL SERVICE COMMISSION — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Keller, J., not sitting.

ENTERED October 18, 2000.

/s/Joseph E. Lambert
Chief Justice

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 1998-CA-002039-MR

ROBERT RELFORD, JAMES M. MORRIS, ESQ.,
AND MORRIS & MORRIS, P.S.C. — APPELLANTS

V. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES KELLER, JUDGE
ACTION NO. 97-CI-03837

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE
COMMISSION — APPELLEE

AND:
CROSS-APPEAL NO. 1998-CA-002301-MR

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE
COMMISSION — CROSS-APPELLANT

V. — APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES KELLER, JUDGE
ACTION NO. 97-CI-3837

ROBERT RELFORD — CROSS-APPELLEE

ORDER DENYING PETITION FOR REHEARING

★ ★ ★ ★ ★ ★ ★

BEFORE: BUCKINGHAM, KNOPF, AND MILLER, JUDGES.

The court having considered the Petition for Rehearing and the Response thereto, and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: FEB 25, 2000.

/s/William L. Knopf

RENDERED: December 3, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
No. 1998-CA-0022039-MR

ROBERT RELFORD,
JAMES M. MORRIS, ESQ., AND
AND MORRIS & MORRIS, P.S.C. — APPELLANTS

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES KELLER, JUDGE
ACTION NO. 97-CI-03837

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE
COMMISSION — APPELLEE

AND:
CROSS-APPEAL NO. 1998-CA-002301-MR

LEXINGTON-FAYETTE URBAN COUNTY
GOVERNMENT CIVIL SERVICE
COMMISSION — CROSS-APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES KELLER, JUDGE
ACTION NO. 97-CI-3837

ROBERT RELFORD — CROSS-APPELLEE

OPINION
AFFIRMING
★★ ★★ ★★ ★★ ★★

BEFORE: BUCKINGHAM, KNOPF, AND MILLER, JUDGES

MILLER, JUDGE: Robert Relford, James M. Morris, Esq., and Morris & Morris, P.S.C. bring Appeal No. 1998-CA-002039-MR from an August 13, 1998 order of the Fayette Circuit Court, and Lexington-Fayette Urban County Government Civil Service Commission (Civil Service Commission) brings Cross-Appeal No. 1998-CA-002301-MR from a July 15, 1998 opinion and order of the Fayette Circuit Court. We affirm.

Robert Relford is a civil service employee of Lexington-Fayette Urban County Government. On June 20, 1997, he was served by Robert Ramsey, then Director of the Division of Building Maintenance and Construction, with a "Notification of Reasonable Cause Testing." It ordered him to undergo drug testing. The notification was predicated upon the belief that Relford had recently been charged with possession of controlled substance and drug paraphernalia. Relford refused to undergo testing. He maintained that the notification was defective because he had not been, in fact, charged with a controlled substance violation. Through counsel, he sought to have the reasonable cause notification so amended. However, his request was denied. Consequently, the Civil Service Commission entered an October 15, 1997 opinion and order acknowledging that the notification to Relford was inadequate, but nevertheless suspending Relford, without pay, for thirty days.

Relford appealed to the Fayette Circuit Court pursuant to Ky. Rev. Stat. 67A.290. On July 15, 1998, the

circuit court reversed the Civil Service Commission's opinion and order suspending Relford. The court concluded that the Civil Service Commission acted arbitrarily by not following its own drug testing procedures. Through counsel, Relford then filed a motion requesting an award of attorney fees. On August 13, 1998, the circuit court entered an order denying the motion. These appeals follow.

APPEAL NO. 1998-CA-002039-MR

The sole issue in this appeal is whether Relford, who successfully appealed an adverse decision of the Civil Service Commission, is entitled to an award of attorney fees. Relford claims he comes within the purview of the Civil Rights Attorney's Fee Award Act of 1976 codified in 42 U.S.C. §1988 (Civil Rights Fee Act). That act provides in relevant part as follows:

> In *any action or proceeding to enforce a provision of* sections 1981, 1981a, 1982, *1983*, 1985 and 1986 of this title, title IX of Public Law 92-318..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. [Emphasis added.]

We are, however, unable to agree with Relford. He claimed that the Civil Service Commission acted arbitrarily, and by so doing, violated his Fourth Amendment Constitution rights. We do not view Relford's Fourth Amendment claim as within the compass of the Civil Rights Fee Act. In sum, we do not believe that Relford asserted a "civil rights" claim cognizable under Civil Rights Fee Act. *See Dawson v.*

Birenbaum, Ky., 968 S.W.2d 663 (1998). As such, we are of the opinion that Relford is not entitled to an attorney fees award.

CROSS-APPEAL NO. 1998-CA-002301-MR

On cross-appeal, the Civil Service Commission contends that the circuit court improperly reversed its order suspending Relford without pay for thirty days. Specifically, it asserts that there existed substantial evidence to support the notification of drug testing and imposition of a thirty-day suspension. We disagree.

We believe it incumbent upon a governmental agency to follow its own rules and regulations. We are compelled to agree with the circuit court that the Civil Service commission failed to follow its own drug testing procedures as established in the "Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook" (Handbook). In this regard, we shall defer to the circuit court's ratiocination:

> There were several types of testing programs set out in the Handbook, but the petitioner was specifically given notice that he was to be tested under "Reasonable Cause Testing." The policy for this type of testing was delineated, as follows:
>
> Reasonable Cause Testing (RCT) - Employees will be tested for drugs or alcohol when reasonable suspicion exists to support a belief that the employee is under the influence of drugs or alcohol or that the emplyee's [sic]

> behavior or work performance has been affected by drugs or alcohol. The basis for the decision shall be documented, in writing, by at least two (2) trained supervisors or by professional law enforcement or medical personnel. A determination will be based upon observation and documentation of:

1.) Detection of an alcoholic substance emitting from the employee's breath. This shall include a detection of a "hang-over" odor.

2.) Observation(s) of the employee's speech being unusually slurred, or noticeably different without a proper medical reason being given.

3.) Observation(s) of the employee's action or conduct as being noticeably different or impaired and not consistent with normal conduct and without proper explanation.

4.) Observation(s) that the employee's appearance, in conjunction with the above, indicates that the employee is impaired.

Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook, 13 (1996).

The Handbook also defines reasonable suspicion, as follows:

> Reasonable Suspicion-Whether a reasonable, prudent individual, trained in the symptoms of drug or alcohol abuse would believe, based on observation, that someone was under the influence of drugs or

alcohol; or that based on observation that drugs and/or alcohol is being used or stored on LFUCG property.

Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook, 5 (1996).

Based on these provisions, there are several reasons that the testing of the petitioner should not have been ordered. The first is that the reason given for the testing was an arrest of the petitioner for possession of a controlled substance and paraphernalia. This is not one of the criteria for ordering a drug test under Reasonable Cause Testing in the Handbook, regardless of the fact the petitioner was not arrested for possession of a controlled substance.

A second reason is that the basis for the decision to test was not properly documented. Under the policy, two supervisors must document, in writing, the reasons for testing. In this case, only one, Robert Ramsey, provided any type of basis. There is no indication in the record that this was documented by writing or that there were any additional supervisor observations. There is also no indication of any actual observances of the petitioner other than his arrest, which has already been disgarded [sic] as a valid basis for the testing. There was a written statement (the police incident report) in the record from a law enforcement officer, E. A. Hart, that he observed the petitioner in possession of drug paraphernalia, but this still is not one of the criteria for Reasonable Cause Testing.

Finally, reasonable suspicion, as defined in the Handbook, was not satisfied. There is no indication in the record that the petitioner was observed under the influence of drugs or alcohol. There is also no indication that the petitioner was using, had used or was storing drugs or alcohol "on LFUCG property."

Upon the whole, we conclude that the "Notification of Reasonable Cause Testing" was not issued in compliance with the Handbook's procedures. Thus, we are of the opinion that failure of the Civil Service Commission to follow its own drug testing procedures rendered the notification and subsequent suspension of Relford arbitrary. *See American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission*, Ky., 379 S.W.2d 450 (1964).

For the foregoing reasons, Appeal No. 1998-CA-002039-MR is affirmed. Cross-Appeal No. 1998-CA-002301-MR is affirmed.

ALL CONCUR.

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

ROBERT RELFORD — PETITIONER

V.

ORDER
AUGUST 13, 1998

No. 97-CI-03837

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT
CIVIL SERVICE COMMISSION — RESPONDENT

★ ★ ★ ★ ★ ★ ★ ★ ★ ★ ★

The Petitioner having filed a Motion for Attorneys' Fees and Costs, and the Respondent having filed a Motion to Alter, Amend or Vacate, the parties having appeared through counsel, and the Court having heard the arguments of counsel and having reviewed the record herein, and being otherwise sufficiently advised, it is hereby ORDERED and ADJUDGED as follows:

1. This Court's Order dated August 10, 1998 is hereby set aside.

2. Since the Court is unaware of any statutory authority authorizing a public employee to recover attorneys' fees and costs upon successful reversal of an adverse governmental employment related determination, Petitioner's Motion for costs and fees is OVERRULED.

3. Respondent's Motion to Alter, Amend or Vacate is OVERRULED.

This is a final and appealable Order.

Signed this the 13 day of August, 1998.

/s/ James E. Keller
JUDGE FAYETTE CIRCUIT COURT
FIRST DIVISION

FAYETTE CIRCUIT COURT
CIVIL BRANCH
FIRST DIVISION

ROBERT RELFORD — PETITIONER

V. — OPINION AND ORDER — NO. 97-CI-3837

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT CIVIL SERVICE COMMISSION — RESPONDENT

OPINION

This matter is before the court on appeal from the Lexington-Fayette Urban County Government Civil Service Commission's order suspending the petitioner, Robert Relford, for thirty (30) days for refusing to submit to drug testing. We REVERSE.

On May 29, 1997, Relford was arrested for possession of drug paraphernalia. Once the arrest came to the attention of his supervisor, Relford was served with a "Notice of Reasonable Cause" ordering him to immediately submit to a drug test "for cause" at the Urgent Treatment Center. Relford was escorted to the Urgent Treatment Center by his supervisor.

Before undergoing the test Relford sought the advice of counsel. His attorney noted that the reasonable cause notice stated that Relford had been arrested for possession of a controlled substance. At his attorney's

suggestion, Relford requested that the reasonable cause notice be reissued to reflect the correct charges. The supervisor refused the request and Relford refused to take the drug test. The Civil Service Commission then issued an order suspending Relford without pay for thirty (30) days because he refused to take the drug test.

Relford filed this appeal pursuant to KRS 67A.290, which states:

> (1) Any employee of the urban-county government found guilty by the civil service commission of any charge as provided by KRS 67A280...may appeal to the Circuit Court of the county in which the urban-county government is located...

KRS 67A.290. This section also provides that such appeals shall be tried de novo:

> (2) Upon request in writing by the accused and the payment of costs therefor, the secretary of the civil service commission shall file a certified copy of the charges and the judgment of that body in the Circuit Court. Upon the transcript being filed the cases shall be docketed in the Circuit Court and tried de novo.

KRS 67A.290.

This review is not to be the traditional de novo review, but rather is limited "to a determination of whether the administrative body acted arbitrarily." *Brady v. Pettit*, Ky., 586 S.W.2d 29, 33 (1979). Arbitrary has been defined as clearly erroneous, meaning "unsupported by substantial evidence." *Thurman v.*

Meridian Mutual Insurance Company, Ky., 345 S.W.2d 635, 639 (1961). "The appeal is not the proper forum to retry the merits. It is limited to only the question of whether [the government agency's action] was clearly unreasonable." *Crouch v. Jefferson County, Kentucky Police Merit Board*, Ky., 773 S.W.2d 461, 464 (1989). This court can examine any evidence (including new evidence) which may be relevant to the issue of arbitrariness. *Id.* at 464.

The issue on appeal, therefore, is to determine if the respondent acted arbitrarily and capriciously in its decision to suspend the petitioner. This will be decided by examining evidence to determine if the respondent's action was clearly erroneous or if the evidence was sufficient to support the decision.

In *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), the United States Supreme Court said:

> Because it is clear that the collection and testing of urine intrudes upon expectations of privacy and that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.

Id. at 617.

Reasonable suspicion testing has been held constitutional under the Fourth Amendment of the Constitution of the United States. *See, Alabama v. White*, 496 U.S. 325 (1990); *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3rd Cir. 1988); *American Federation of Government Employees, AFL-CIO, Local 2391 v.*

Martin, 969 F.2d 788 (9th Cir. 1992); *Garrison v. Department of Justice*, 72 F.3d 1566 (Fed. Cir. 1995). What is "reasonable" has been based on the circumstances surrounding the suspicion in the particular case. *White*, 496 U.S. at 325; *See, Garrison*, 72 F.3d at 1566. In *White, supra*, the United States Supreme Court said "reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability." *Id.* 496 U.S. at 330. Furthermore, the United States Court of Appeals for the Ninth Circuit has held that off duty conduct can serve as grounds for reasonable suspicion for drug screen testing. *Martin*, 969 F.2d at 788.

The petitioner was selected for testing based on information that he had been arrested for possession of a controlled substance and drug paraphernalia while off duty. Under the rule in *Martin*, 969 F.2d at 788, this may have been grounds for reasonable cause testing because off duty conduct can satisfy reasonable suspicion. Conversely, under the rule in *White*, 496 U.S. at 325, concerning the reliability of the information possessed by the employer, the grounds may not have been reasonable. This is because the information possessed by the respondent, according to the notice provided the petitioner, was not completely accurate. The petitioner was not arrested for possession of a controlled substance. This may be an indication that reasonable suspicion was not established based on the circumstances in this case. This does not mean that an arrest for possession of drug paraphernalia alone would not establish reasonable suspicion under *Martin*.

Whether or not the constitutional concerns are satisfied in this case is not really relevant because the respondent has failed to follow its own drug testing policies. The urban county government had established these policies in the "Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook" (Handbook). There were several types of testing programs set out in the Handbook, but the petitioner was specifically given notice that he was to be tested under "Reasonable Cause Testing." The policy for this type of testing was delineated, as follows:

> **Reasonable Cause Testing** (RCT)-Employees will be tested for drugs or alcohol when reasonable suspicion exists to support a belief that the employee is under the influence of drugs or alcohol or that the emplyee's behavior or work performance has been affected by drugs or alcohol. The basis for the decision shall be documented, in writing, by at least two (2) trained supervisors or by professional law enforcement or medical personnel. A determination will be based upon observation and documentation of:
>
> 1.) Detection of an alcoholic substance emitting from the employee's breath. This shall include a detection of a "hang-over" odor.
>
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>
> 3.) Observation(s) of the employee's action or conduct as being noticeably different or impaired and not

consistent with normal conduct and without proper explanation.

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The Handbook also defines reasonable suspicion, as follows:

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Lexington-Fayette Urban County Government Alcohol and Drug Free Workplace Guidelines and Procedure Handbook, 5 (1996).

Based on these provisions, there are several reasons that the testing of the petitioner should not have been ordered. The first is that the reason given for the testing was an arrest of the petitioner for possession of a controlled substance and paraphernalia. This is not one of the criteria for ordering a drug test under Reasonable Cause Testing in the Handbook, regardless of the fact the petitioner was not arrested for possession of a controlled substance.

A second reason is that the basis for the decision to test was not properly documented. Under the policy, two supervisors must document, in writing, the reasons for testing. In this case, only one, Robert Ramsey, provided any type of basis. There is no indication in the record that this was documented by writing or that there were any additional supervisor observations. There is also no indication of any actual observances of the petitioner other than his arrest, which has already been disgarded as a valid basis for the testing. There was a written statement (the police incident report) in the record from a law enforcement officer, E. A. Hart, that he observed the petitioner in possession of drug paraphernalia, but this still is not one of the criteria for Reasonable Cause Testing.

Finally, reasonable suspicion, as defined in the Handbook, was not satisfied. There is no indication in the record that the petitioner was observed under the influence of drugs or alcohol. There is also no indication that the petitioner was using, had used or was storing drugs or alcohol "on LFUCG property."

For these reasons, requiring the petitioner to submit to Reasonable Cause Testing did not satisfy reasonable suspicion under the urban county government's own drug policy; therefore, the decision of the respondent was arbitrary.

ORDER

The order of the Lexington Fayette Urban County Government Civil Service Commission is hereby REVERSED.

/s/ James E. Keller
JUDGE, JAMES E. KELLER